WRITTEN TESTIMONY OF ALAN FRANK FOR THE FCC EN BANC HEARING ON TELEVISION DUOPOLIES AND LMAs ON FEBRUARY 12, 1999

I am Alan Frank, President and General Manager of WDIV(TV), the Post-Newsweek station in Detroit, and Chairman of the NBC Television Affiliates Association. I am here in place of Bill Ryan, who is President and Chief Executive Officer of Post-Newsweek Stations, and who could not be here because of a longstanding unbreakable commitment. Bill made great efforts over the past month to accommodate the shifting dates for this hearing. He wanted to be here because he is deeply committed to the principles at stake in this hearing.

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I

The controlling principle for broadcast ownership issues is localism. Although it has been at the core of the Communications Act since 1934, localism remains the soundest available guide for current broadcast regulatory issues. Consistent with this statutory mandate, our country's television service is universal, free, and locally and nationally diverse and competitive. It is the localism principle, faithfully administered by the Commission, that explains why our local broadcast system is the envy of the world. Proposals to water down the duopoly rule and to permit LMAs indiscriminately run counter to the localism principle.

From a consumer's perspective, localism is local news and weather emergency information, coverage of candidates for the communities they represent, and station support of local charities and civic activities. (This is a generalization that fails utterly to give adequate tribute to the array of day-in, day-out special contributions that just our station in Detroit, for instance, makes to the communities we serve). From a programming perspective, it is the balance of network and locally produced or selected programming – a mix that local stations tailor to the audiences in their communities. From a statutory/regulatory perspective, it is Section 307(b) of the Act, the table of channel allotments, and propagation, interference and other technical rules that provide the structure for local television service throughout the United States.

Localism has driven the policy decisions of Congress and the Commission for 65 years. The table of DTV channels, the FCC's recent defense of the Grade B standard, the preservation of the 35% cap, the FCC's refusal thus far to eliminate the rule that preserves for local affiliates the right to preempt network programming that they prefer not to carry, and Congress' insistence on reasonable DTV cable carriage rules are all examples of the continued applicability of the localism principle.

II

We believe that the localism principle requires a meaningful duopoly rule so as to assure a diverse and competitive local marketplace. It is healthy to have different entities owning and controlling different broadcast outlets in a market. It leads to economic, programming, and viewpoint competition and diversity.

It stands to reason that generally it is preferable from the point of view of competition and diversity to have five stations in a market being operated by five different licensees, rather than to have two of them (or two sets of two of them) being co-owned under a duopoly or co-managed and controlled under an LMA. These stations are operated under licenses assigned by the Commission in the public interest. In assigning these licenses, it is right and proper for the Commission to enact rules that promote diversity and competition by limiting common ownership and control in the local market. Therefore, we support the duopoly principle.

However, like others, we believe the existing Grade B standard for the duopoly rule is unrealistic and overbroad. Generally, a Grade A/DMA standard would be reasonable, and we support a rule modification to this effect. Both the Grade A and DMA standards effectively measure the areas in which local stations compete against each other, although their service to the public reaches beyond. The distinction between UHF and VHF is becoming outmoded and will largely expire in the digital world. Accordingly, it should not be a basis for exceptions to the duopoly rule. Exceptions might, however, be permitted for failing stations – UHF or VHF.

III

Most LMAs are simply a way of evading the duopoly rule. Seven years ago, the Commission decided in the radio environment that if one station duplicates more than 15% of the programming of another station, it should be treated for purposes of the duopoly rule as being co-owned. The Commission treated LMAs as equivalent to ownership, and therefore subject to the duopoly rule, "as a means of preventing circumvention of the ownership rules through local time brokerage arrangements." Revision of Radio Rules and Policies, FCC 92-97, 7 FCC Rcd. 2755, 2761 (1992). The Commission was "particularly concerned" that these arrangements "could undermine [its] continuing interest in broadcast competition and diversity." Id. at 2788. That made eminent sense in the radio context. And for the same reasons it makes equally good sense in the television context. As with the duopoly rule, we agree that exceptional circumstances (for example, severe financial hardship) may justify waivers.

We can also appreciate the appropriateness of grandfathering existing LMAs but within limits. If an LMA is a sham, it should not be entitled to any grandfathering. Otherwise, grandfathering should be determined based on whether the LMA was entered into before or after November 5, 1996, for the Commission on that date gave clear notice that stations which entered LMAs prospectively did so at their own risk. Therefore, stations that entered into LMAs after that date should be given only a short period, certainly no more than a year, to come into compliance with the rules. As to LMAs entered into before November 5, 1996, they should be grandfathered for the duration of their term or for three to five years, whichever is less. Those that entered into LMAs of excessive length, like 15 or 20 years, should not be rewarded for overreaching. Stations that entered into LMAs prior to November 5, 1996, should have known that these arrangements would one day be treated as equivalent to ownership and therefore subject to the duopoly rule. The rule for radio LMAs was already in effect and it was clear even then that there was no difference in principle between television and radio LMAs. In light of this history, these grandfathering proposals seem reasonable and even generous.

IV

We now turn to the specific questions that the Commission has asked the Second Panel to address.

1. **What is the status of competition and diversity in the mass media at the local level? How does the emergence of cable and new video outlets affect your views on this issue? To what extent do these other media and new outlets compete with broadcast TV and radio?**

By and large, competition and diversity are healthy in the mass media video market at the local level. By diversity, we mean diversity of viewpoint, diversity of service, diversity of management style, and diversity of ownership. It may be that there should be more minority and female ownership, although I note that Mrs. Graham continues to be the largest shareholder of The Washington Post Company, our parent company. On both a local and national basis, cable and new video outlets compete with local television stations for advertising dollars, viewers, programming talent and other resources. Cable and new video outlets add to national and, in some respects, regional program diversity, but they provide very little in the way of local service and, therefore, contribute only marginally to local program and viewpoint diversity.

I would add that two of the greatest threats to local competition and diversity in television are the growing power of the networks at the expense of local affiliates and the trend toward consolidation at the local and national levels, radio concentration being the prime harbinger of what would happen if the national cap and duopoly rules were diluted. For in the local radio marketplace and nationally, competition and diversity are in a very unhealthy state.

2. **What are the benefits of common ownership? How do these benefits serve the viewer or listener?**

Common ownership may result in economies which lead to competitive advantages for one set of competitors over its rivals. These economies may benefit the two stations that are commonly owned. But they may also result in competitive harm to others whose service to the public will be adversely affected thereby. Whatever benefits are achieved by the commonly owned or commonly controlled stations will usually be outweighed by the negative impact on other competitors and by the diminution of diversity and the elimination of competition between the co-owned or commonly controlled stations.

3. How does ownership consolidation affect the FCC's traditional goals of promoting diversity and competition in broadcasting.

For the most part and making exceptions for failing station situations, ownership consolidation hurts the FCC goals of enhanced diversity and competition in the local television market.

4. Based on your experience, is there a connection between ownership and the political and social viewpoint presented over the airwaves, either in news and public affairs programming or entertainment programming? It would be helpful to give specific examples to support your view.

It stands to reason that stations that are independently owned and operated will tend to approach programming and other competitive decisions differently from those that are under common control or ownership. This does not necessarily mean that the program content of two independently-owned and operated stations will be more different from each other than if they were co-owned or subject to an LMA. In some cases, the programming may be more similar and therefore more competitive, for example when independent stations compete head to head in local news rather than, if they were co-owned or involved in an LMA, they scheduled entirely different programming in the same time slot. Reasonable duopoly and LMA rules mean that program-related decisions will be made independently, without regard to their impact on the co-owned or LMA-ed station.

5. Has broadcast industry consolidation had an impact on the ability of small businesses, including businesses owned by minorities and women, to enter into and compete in broadcasting?

We do not know of any adverse impact in television, and we do not have sufficient information to comment on this issue for radio. Our position on the duopoly and LMA issues for television is not dependent on such considerations.

6. In light of your diversity and competition goals, how would you draft a TV duopoly rule for the FCC?

We think the duopoly rule generally should prohibit stations to be co-owned where there is a Grade A overlap or they are in the same DMA. We would make an exception for failing station situations and would waive the rule in other special situations but would make no special allowance for UHF stations.

7. Assuming LMAs become attributable under the FCC's ownership rules and that some would violate your proposed duopoly rule, would you grandfather these existing LMAs? For how long and under what circumstances, e.g., would you allow them to be renewed or transferred?

If an LMA is a sham, it should not be entitled to any grandfathering. Otherwise, the grandfathering should be determined based on whether the LMA was entered into before or after November 5, 1996, for the Commission on that date gave clear notice that stations which entered LMAs prospectively did so at their own risk. Therefore, LMAs entered into after that date should be given only a short period, no more than a year, to come into compliance with the rules. As for LMAs entered into before November 5, 1996, they should be grandfathered for the duration of their term or for three to five years, whichever is less. Those that entered into LMAs of excessive length, like 15 or 20 years, should not be rewarded for overreaching. Because the rule for radio LMAs had been in effect for years and it was clear even then that there was no difference in principle between television and radio LMAs, television stations entering into LMAs prior to November 5, 1996, are not entitled to wholly unrestricted grandfather rights.

8. In light of your diversity and competition goals, how would you draft a TV-radio cross-ownership rule for the FCC?

Post-Newsweek takes no position on this rule. But I would make the personal observation that these cross-ownerships can lead to undesirable conduct. For example, in Detroit our television station approached the all-news radio station owned by CBS (which also owns a television station and other radio stations in Detroit) with a proposal that it carry our emergency weather coverage and that we cross-promote each other's service in this regard. The radio station initially expressed enthusiasm for this proposal but ultimately rejected it because its co-owned television station exercised veto power over the radio station's programming decisions.

9. Assuming some of the conditional waivers of the TV-radio cross-ownership rule granted since passage of the 1996 Telecom Act would violate your proposed revised rule, how would you treat these conditional waivers? Would you require waiver holders to come into compliance with the new rule? How soon?

We take no position on the TV-radio cross-ownership waiver policy, as we take no position on the rule itself.

10. How would relaxation of local ownership rules affect advertising and program distribution (e.g., syndication) pattern and practices?

It seems reasonable that if the local ownership rules were compromised, there would be fewer stations competing for advertising and programming and therefore the prices local retailers pay for commercial time might increase and the prices program syndicators could extract from a market might decrease (resulting in lower rewards and incentives to the program community and, in turn, lower quality programming). These harms are not theoretical. Syndicated programmers themselves have publicly expressed great concern with the negative impact LMAs have had on them. Duopolies and LMAs tend to strangle diversity of programming from these sources.

11. How should digital television be factored into our thoughts? Would duopolies provide more resources and economies to assist conversion to digital or would they reduce broadcasters' incentives and interest in making the conversion?

We don't believe that the advent of digital should affect the public policy analysis at all. Undue concentration would have comparable effects on diversity and competition in the digital world just as it does in the analog world. Conceivably, because of the burdens of the digital conversion, the failing station exception might be justified more frequently, but the principle would be the same. The Commission can much more effectively support the transition to digital by adopting reasonable DTV carriage rules and playing an effective role in cable compatibility issues than by abandoning the principle of local competition and diversity. Of course, the Telecommunications Act of 1996 provided that the duopoly rule should not apply to situations where existing DTV licensees bid for new DTV stations to be operated on spectrum turned back to the Commission when the digital transmission has been completed. That is not the same as one existing DTV station buying another existing DTV station in the same community.

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Post-Newsweek appreciates the opportunity to appear today. We know that broadcasting must continue to change. That is why, for example, we are exploring new services that digital technology may make possible. But we believe the best strategies will be those that build on and enhance localism, not ones that turn their back on the localized service that our system has been designed to foster, that good broadcasters in fact provide and that the public continues to rely on and benefit from. Accordingly, the Commission should retain a reasonable duopoly standard and adopt an LMA policy that is consistent with this standard.